

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)

SoundBite Communications, Inc.)

Petition for Declaratory Ruling)

CG Docket No. CG 02-278

COMMENTS OF TWILIO INC.

Michael B. Hazzard
Jason A. Koslofsky
Arent Fox LLP
1050 Connecticut Ave, N.W.
Washington, DC 20036-5339
Tel: (202) 857-6029
Fax: (202) 857-6395
hazzard.michael@arentfox.com
koslofsky.jason@arentfox.com

Counsel to Twilio Inc.

Dated: April 30, 2012

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND SUMMARY	1
II. TWILIO	2
III. CONFIRMATORY, OPT-OUT TEXT MESSAGES DO NOT VIOLATE THE TCPA	5
A. Confirmatory, Opt-Out Text Messages Are Sent With the Prior Express Consent of the Consumer	5
B. Confirmatory, Opt-Out Text Messages Are Not Sent Using An Autodialer	6
C. Confirmatory, Opt-Out Text Messages Fall Under the TCPA Grace Period	8
D. Confirmatory, Opt-Out Text Messages Are Sound Public Policy	8
E. The Commission Should Resolve Other Pending Petitions on Text Messages	9
1. Resolve Public Knowledge’s Petition	9
2. Resolve Club Texting’s Petition	10
3. Provide USAC Guidance	11
IV. CONCLUSION	11

Twilio Inc. (“Twilio”) submits these comments in response to the Federal Communications Commission’s Public Notice seeking comment on the Petition for Expedited Declaratory Ruling from SoundBite Communications, Inc. (“SoundBite”),¹ which seeks a declaratory ruling that confirmatory, opt-out text messages do not violate the Telephone Consumer Protection Act (“TCPA”).²

I. INTRODUCTION AND SUMMARY

Twilio urges the Commission to grant SoundBite’s Petition and end a long-standing source of uncertainty regarding text message communications (also known as SMS). SoundBite’s Petition addresses the uncertainty surrounding confirmatory, opt-out text messages, which are one-time text messages sent after a consumer sends an opt-out text message requesting no further text messages be sent.³

The uncertainty involving confirmatory, opt-out text message arises from the TCPA’s prohibition on unsolicited text messages⁴ and plaintiffs’ lawyers’ absurd reading of the

¹ *SoundBite Communications, Inc.*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Feb. 16, 2012) (SoundBite Petition).

² See Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from SoundBite Communications, Inc.*, CG Docket No. CG 02-278, DA 12-511 (March 30, 2012).

³ A typical scenario involving confirmatory, opt-out text messages, would be a consumer that signs up for weather alert text messages from a company WeatherText. By signing up for the weather alerts, this consumer has provided express consent to receive text messages from WeatherText under the TCPA. Later, the consumer decides they no longer wish to receive these alerts so they send a “STOP” text message in response to the most recent text message. Shortly thereafter, WeatherText responds with a text message that states something like, “This msg confirms that you have discontinued and will no longer receive messages from this service. Contact WeatherSMS at [telephone/website] for help.” In short, the confirmatory, opt-out text message does just that – quickly and simply assures the consumer that they will not receive any more text messages from the company.

⁴ See 47 U.S.C. § 227(b)(1)(A)(iii).

TCPA as prohibiting these text messages as unsolicited. As SoundBite notes, many companies are facing multi-million dollar lawsuits based on plaintiffs' lawyers' theory that once the consumer texts "STOP" any subsequent text message, including consumer-friendly, one-time, text messages, are unsolicited and violate the TCPA. SoundBite Petition at 2, n.4. But, such a finding would be an absurd reading of the TCPA, would harm consumers, and would increase the burden on companies using text messages, which include large and small companies in nearly every sector of the economy. Any number of other companies sending text message alerts are at risk of a TCPA lawsuit because they have sent confirmatory, opt-out text messages. This uncertainty is holding back the industry and preventing consumers from benefitting from new text message products and services. Thus, Twilio strongly urges the Commission to find that confirmatory, opt-out text messages do not violate the TCPA.

In clarifying the status of confirmatory, opt-out text messages, the Commission should go further and address a number of outstanding issues related to text messages. Several petitions are outstanding and a request for guidance from USAC remains unanswered. The Commission should seize this opportunity to address the many unresolved issues regarding text messages, providing clarity to the industry, and benefits to consumers who have come to rely on text message-based products and services. In particular, the Commission should apply principles of nondiscrimination to text messages and ensure that companies that create the technology to send text messages are not held liable when a user abuses that technology.

II. TWILIO

Twilio was founded over three years ago as an innovative Internet-based cloud communications company that is reinventing telecommunications by merging cloud computing, web services, and traditional telecommunications. Twilio hosts a telephony infrastructure web service in the cloud, allowing web developers to integrate phone calls, text messages, and IP

voice communications into their web, mobile, and traditional phone applications. In short, Twilio takes things that are complicated about telecommunications and makes them simple.

Using Twilio's software platform and simple developer tools, web developers and businesses can build sophisticated unified communications solutions such as call centers, office phone systems, call tracking tools, and more that interoperate with multiple telephone networks. Twilio's powerful API minimizes the learning curve required to build advanced, reliable voice communications applications on the Internet that solve critical business and consumer needs. Twilio's products work simultaneously across platforms, allowing web browsers, mobile phones, and tablets running iOS or Android to communicate seamlessly. Twilio's service integrates with traditional phone service and text messages/SMS using Twilio's existing web service APIs for making and receiving phone calls and text messages.

One of the fastest growing portions of Twilio's business is mobile application development. Over 70,000 developers have used Twilio to integrate telecommunications into their applications and products. Twilio has gone from three employees to over one hundred employees in three years and has plans to hire many more "high-tech" employees in the coming years. The thousands of developers that are using Twilio are creating jobs when they invent a new product or application that captures the consumer's attention and grows into a business.⁵

⁵ A recent TechNet sponsored study found that the app economy represented 460,000 jobs, up from zero in 2007. TechNet.org, New TechNet Sponsored Study: Nearly 500,000 "App Economy" Jobs in United States (Feb. 7, 2012), *available at* <http://www.technet.org/new-technet-sponsored-study-nearly-500000-app-economy-jobs-in-united-states-february-7-2012> (last visited March 30, 2012).

As the Chairman has recognized, apps mean jobs. Speaking at an event in San Francisco on November 4, 2011, Chairman Genachowski stated that a conservative estimate of one job per app meant that thousands of jobs had been created during the recent mobile app boom. *See* <http://techcrunch.com/2011/11/04/ron-conway-fcc-chairman-genachowski-and-other-tech-stars-team-up-to-fight-the-spectrum-crunch> (last visited Nov. 30, 2011).

Finally, Twilio is quickly expanding internationally, having recently announced launches in England and Europe.

Many new products and services using Twilio often rely on text messages to convey information and reach consumers. For example, Intuit Inc. used Twilio to develop a new security feature which sends a verification code to the online user's phone, via phone call or SMS, when an online user attempts to change sensitive data. This minimally intrusive security feature prevents identity theft while relying on the cloud to save time and money in implementation. WalMart was able to create SMS notifications for its "Values of the day" discounts using Twilio, which allowed WalMart to test the idea quickly and inexpensively before rolling out the feature.

New text message-based companies are also being created using Twilio as a foundational tool. GroupMe, which provides a free group text messaging service, was created using Twilio during a programming contest in 2010. GroupMe was quickly able to add features and attract users by using Twilio to easily increase the reach of their products and services. GroupMe, one of the hottest recent Internet telecommunications companies, and the jobs created by GroupMe would not exist without Twilio. GroupMe has been so successful that it was acquired by Skype.

In short, Twilio is part of a new generation of companies involved in telecommunications that are benefiting consumers by opening up new text message applications, products, and services for existing companies like Intuit and Walmart, and newly-formed companies like GroupMe. Twilio files these comments because text messages are an important part of its business and the uncertainty surrounding confirmatory, opt-out text messages is harmful to the industry and Twilio's customers.

III. CONFIRMATORY, OPT-OUT TEXT MESSAGES DO NOT VIOLATE THE TCPA

The TCPA was intended “[t]o protect consumers from unwanted calls.”⁶ This goal is not served by banning confirmatory, opt-out text messages that merely inform a consumer that they will no longer receive text messages from a particular sender. Not only do these text messages serve a valuable consumer objective, they are also completely legal under the TCPA.

A. Confirmatory, Opt-Out Text Messages Are Sent With the Prior Express Consent of the Consumer

The TCPA requires “prior express consent” before sending text messages to a called party.⁷ When a consumer initially gives prior express consent to receive text messages from a company that consent extends to a confirmatory, opt-out text message, which assures the consumer that they will not receive further text messages. In other words, a consumer’s prior express consent covers confirmatory, opt-out text messages because it is consistent with the technology underlying text messages, which is a back and forth text conversation between the two parties. Each text message cannot be viewed as the equivalent of a single voice call – but the back and forth text messages should be understood to constitute a longer call. A text message invites a response, including a text message from a consumer stating “STOP.” A consumer gives prior express consent to receive a confirmatory, opt-out text message when they text “STOP,” because it invites a response. This would be just like a caller dialing a company and asking to be placed on the company’s do-not-call list. The company would surely not violate the TCPA by acknowledging and confirming during the same call that the caller was now on the company’s do-not-call list. In fact, as SoundBite points out, prior Commission orders

⁶ *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 55 Communications Reg. (P&F) 356, 2012 WL 507959, ¶ 4 (F.C.C. Feb. 15, 2012).

⁷ 47 U.S.C. § 227(b)(1)(A)(iii).

have required that callers “should ... confirm that any such [company-specific do-not-call] request will be recorded at the time the request is made by the consumer.”⁸ Here, a confirmatory, opt-out text message does just that.

Thus, there is no violation of the TCPA when a consumer texts “STOP” to indicate they no longer wish to receive text messages, and a responsive text message is sent back confirming the consumer’s request will be honored. The responsive text message is consistent with the technology underlying text messages and the prior express consent provided by the consumer. Of course, after the confirmatory, opt-out text message, the consumer has withdrawn consent to receive any further text messages. But a one-time, confirmatory, opt-out text message is sent with the prior express consent of the consumer, and, therefore, valid under the TCPA.

B. Confirmatory, Opt-Out Text Messages Are Not Sent Using An Autodialer

The TCPA also prohibits using an automatic telephone dialing system (“ATDS” or “autodialer”) to make any call without the prior express consent of the called party.⁹ In considering the SoundBite Petition, the Commission should clarify the meaning of “capacity” in the definition of an ATDS and find that confirmatory, opt-out text messages are not sent using an ATDS, and therefore do not violate the TCPA.

An ATDS is defined as “equipment which has the capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”¹⁰ This definition has not changed since the enactment of the TCPA in

⁸ SoundBite Petition at 7 (quoting *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, FCC 03-153, 18 FCC Rcd 14014, ¶ 93 (2003)).

⁹ 47 U.S.C. § 227(b)(1)(A)(iii).

¹⁰ 47 U.S.C. § 227(a)(1); 47 C.F.R. § 64.1200(f)(1).

1991, and is being quickly overcome by technological advances, especially if “capacity” is extended broadly. Almost all modern telecommunications equipment has the capacity, through software or hardware alterations, to autodial random or sequential numbers without human intervention.

The problems associated with attempting to extend old TCPA regulations to new technology are illustrated in the examples laid out by GroupMe, Inc. in its Petition that asks the Commission to clarify the meaning of ATDS in response to opportunistic class action lawsuits. *See* GroupMe Petition at 10-11.¹¹ As GroupMe explains, an iPhone could be considered an ATDS because it has the “capacity” to dial an app that acts as an ATDS from the iTunes store. *Id.* The Commission should grant GroupMe’s Petition, and find that an ATDS must have the capacity, *at the time of use*, to autodial random or sequential numbers without human intervention and without first being altered through hardware or software changes. A broader interpretation of “capacity” would mean that many technologies, such as smartphones or computer servers, would be considered an ATDS under the TCPA even though they do not have the existing capability of autodialing random or sequential numbers without human intervention. GroupMe Petition at 10.

It is also clear that the technology underlying text message marketing, alerts, and information does not constitute an ATDS, even if the Commission does not take steps to clarify the meaning of “capacity” (which it should). Because the text messages at issue here are sent with prior express consent, they cannot by definition be sent randomly or sequentially – only specific individuals are sent text messages because they have affirmatively requested the text messages. Thus, companies like Twilio, GroupMe, and SoundBite do not design their software

¹¹ *GroupMe, Inc.*, Petition for Expedited Declaratory Ruling And Clarification, CG Docket No. 02-278 (filed March 1, 2012) (“GroupMe Petition”).

and hardware to have the capacity to autodial random or sequential numbers because it would serve no purpose. Without this capacity, Twilio, GroupMe, and SoundBite's software and hardware cannot be considered an ATDS and there is no violation of the TCPA.

C. Confirmatory, Opt-Out Text Messages Fall Under the TCPA Grace Period

As SoundBite notes, the TCPA presently allows up to 30 days to process an opt-out request regarding both voice calls and facsimiles. SoundBite Petition at 4. The Commission has also found, and many courts have accepted, that a text message is a "call" for purposes of the TCPA.¹² Thus, if the Commission were to decide that confirmatory, opt-out text message violate the TCPA, text message senders would have the burden of complying with the TCPA, without the attendant benefit of a grace period to comply with an opt-out request. In other words, the TCPA would be inconsistently applied between voice calls and text message "calls" – to the detriment of text message senders. The Commission should consider the technology underlying text messages when considering a grace period for confirmatory, opt-out text messages, but they are typically sent within a few minutes of the "STOP" request from the consumer. In sum, a confirmatory, opt-out text message is fully consistent with a grace period in the TCPA for calls.

D. Confirmatory, Opt-Out Text Messages Are Sound Public Policy

Aside from being legal and valid under the TCPA, confirmatory, opt-out text messages are also good consumer practice. As noted above, text messages generally invite a response, and a confirmatory, opt-out text message is an appropriate response to a consumer's request to no longer receive text messages from a company. The confirmatory, opt-out text message ends any ambiguity of the consumer about whether the company has received the

¹² *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 2012 WL 507959, ¶ 4, n.12 (citing *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009)).

request to no longer receive text messages. In fact, a confirmatory, opt-out text message indicates that the company sending text messages is intent on fully complying with the TCPA and does not want to send unsolicited text messages. If no confirmatory, opt-out text message is sent in response to a “STOP” request, consumers might complain that they do not know whether their request was honored. Moreover, a consumer might then have to make the additional effort to call another telephone number altogether to confirm whether their “STOP” request went through. The confirmatory, opt-out text message eliminates this burden on consumers. And again, it is consistent with what the Commission has already said about confirming for consumers that they their request to be added to a do-not-call list will be honored.¹³

E. The Commission Should Resolve Other Pending Petitions on Text Messages

In addition to resolving the SoundBite Petition on confirmatory, opt-out text messages, the Commission should take action on a number of outstanding issues related to text messages. There are several outstanding petitions and requests for clarification, which deserve Commission attention.

1. Resolve Public Knowledge’s Petition

Pending for over four years, since January 2008, Commission action on the Text Messaging Declaratory Ruling Proceeding WT 08-7 initiated by a petition from Public Knowledge would benefit the industry and consumers by ensuring that nondiscrimination principles are applied to text messages, just like any other type of call.¹⁴ If granted, Public Knowledge’s petition would ensure that carriers cannot block text messages based on the content

¹³ SoundBite Petition at 7; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, at ¶ 93.

¹⁴ See *Public Knowledge, et al.*, Petition For Declaratory Ruling that Text Messages and Short Codes are Title II Services or are Title I Services Subject to Section 202 Non-Discrimination Rules, WT 08-7 (Dec. 11, 2007).

of the text message and that the significant and growing marketplace involving text message applications would thrive without the threat of arbitrary carrier actions. Consumers would benefit because they would never risk a text message not being sent to or received from an application they have chosen to use. As it stands, text messages are in a regulatory limbo, possibly subject to some laws such as the TCPA, yet able to be blocked by wireless carriers if they so choose. Commission action on Public Knowledge's petition would provide some much-needed certainty to the industry.

2. Resolve Club Texting's Petition

Also before the Commission, and pending since August 2009, is a petition by Club Texting which would clarify that application providers that allow others to send text messages are not "senders" under the TCPA.¹⁵ If granted, Club Texting's petition would provide great certainty to application developers that their creative products would not subject them to liability under the TCPA for actions taken by their customers who control the content of messages and to whom messages are sent. The Commission should make clear that it is the customer sending the text messages, even if the application developer's software is used, and that the customer is the responsible party (*i.e.*, the sender) under the TCPA. Companies like Twilio should not be held liable if a third-party customer uses Twilio's services in a way that violates the TCPA. Carriers are afforded this protection, and so should other entities in the call flow, such as aggregators and developers.

¹⁵ See Public Notice, *Consumer & Governmental Affairs Bureau Seeks Comment on Club Texting's Petition for Declaratory Relief that Text Broadcasters are Not "Senders" of Text Messages Under § 227(b)(1) of the Telephone Consumer Protection Act*, CG Docket No. 02-278, DA 09-2387 (Nov. 9, 2009).

3. Provide USAC Guidance

The regulatory limbo of text messages has affected not just businesses and consumers, but is further highlighted by the April 22, 2011 letter from the Universal Service Administrative Company (“USAC”) asking for guidance on how to classify text messaging for Universal Service Fund (“USF”) purposes.¹⁶ USAC has sought Commission guidance on how to classify text message revenue, as telecommunications revenue or non-telecommunications revenue. Noting that the Commission has not affirmatively classified text messages, including short code based text messages, USAC states that it is unable to determine the proper classification for USF purposes. To resolve USAC’s letter, Twilio encourages the Commission to determine that text messaging is a telecommunications service and should be treated as such for all purposes.

IV. CONCLUSION

In sum, Twilio strongly urges the Commission to grant SoundBite’s Petition, as well as take action on the multiple other petitions and request for guidance relating to text messages. The Commission should also ensure that consumers can receive text messages about whatever topic they wish by applying nondiscrimination principles to text messages and that application developers cannot be held liable under the TCPA for actions taken by their customers.

¹⁶ USAC Letter, WC 06-122 (April 22, 2011) available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021346734> (last visited Dec. 2, 2011); *see also* Public Notice, *Wireless Competition Bureau Seeks Comment on Request for Guidance Filed by the Universal Service Administrative Company*, WC 06-122 (May 9, 2011).

Dated: April 30, 2012

Respectfully submitted,

By: s/ Michael B. Hazzard

Michael B. Hazzard

Jason A. Koslofsky

Arent Fox LLP

1050 Connecticut Ave, N.W.

Washington, DC 20036-5339

Tel: (202) 857-6029

Fax: (202) 857-6395

hazzard.michael@arentfox.com

koslofsky.jason@arentfox.com

Counsel to Twilio Inc.